

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

RECEIVED

JAN 19 1999

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of:)	
)	
1998 Biennial Regulatory Review)	MM Docket No. 98-43
Streamlining of Mass Media Applications,)	
Rules, and Processes)	
)	
Policies and Rules Regarding)	MM Docket No. 94-149
Minority and Female Ownership of)	
Mass Media Facilities)	

To: The Commission

PETITION FOR RECONSIDERATION

The Board of Regents of the University of Wisconsin System ("UWS"), by its attorneys, and pursuant to Section 1.429 of the FCC's Rules, petitions for reconsideration of the Commission's *Report and Order* in MM Docket Nos. 98-43 and 94-149, FCC 98-281 (released November 25, 1998) ("*Report and Order*"), insofar as the decision modifies the Rules relating to construction permits extensions. As shown below, the new Rules do not adequately accommodate the legitimate need of existing permittees for a process to extend CPs in situations where construction has been delayed for reasons beyond the permittee's control, such as local zoning problems that have not yet reached a court appeal, budgetary cycles for state and university permittees (or permittees relying on federal grant funds from the Public Telecommunications Facilities Program ("PTFP") of National Telecommunications Information Agency, Department of Commerce), or severe winter weather in areas of the country. All of these problems "encumber" construction, yet the FCC's rules make no provision for extensions in these circumstances, even when the public interest would be served

No. of Copies rec'd 214
List ABCDE

by further extension.

UWS is the licensee of noncommercial educational TV Station WHA-TV, Madison, Wisconsin, and multiple noncommercial educational radio stations throughout the State of Wisconsin. UWS is also the permittee of noncommercial educational radio Station WSUM(FM), Madison, Wisconsin. In addition, UWS had entered into agreements with another Wisconsin State Agency to create "Wisconsin Public Radio" -- a programming service that provides noncommercial educational radio programming to stations throughout the State. UWS is concerned that the new rules will set an impossibly tight timeline for construction of Station WSUM(FM), which has been delayed due to complex, time-consuming zoning restrictions. UWS is also concerned that the FCC's new, draconian CP rules will adversely affect its ability to add new stations, or to modify existing stations, in a manner consistent with the state budgetary cycle, the PTFP grant cycle, and the winter weather that plagues northern climates like Wisconsin.

STATION WSUM(FM), MADISON, WISCONSIN

In 1996, UWS submitted an application for a new student radio station to serve the Madison area. (FCC File No. BPED-960116MK) The FCC granted the application on October 21, 1996 for a construction period through April 21, 1998. UWS thereupon diligently began the process of constructing the new tower and station facilities. Unfortunately, however, UWS immediately encountered zoning issues during the local land use approval process for the new tower.^{1/} Since that time, UWS has filed two requests for

^{1/} The zoning process just recently resulted in a court appeal. Therefore, under the narrow and inflexible new Rules governing construction periods, the delay caused both by the process itself, and any future need to modify the tower proposal to accommodate failure to

extensions of its permit for Station WSUM(FM), based upon its zoning approval problems. A timeline of the zoning problem for Station WSUM is attached as Attachment 1. It demonstrates that, despite UWS's diligent efforts, the initial zoning process took over 21 months (without including the still-pending court appeal).

The timeline in Attachment 1 shows that, on April 16, 1998 and after over a year of solid efforts, UWS obtained zoning approval from the Dane County Zoning and Natural Resources Board ("Zoning Board") concerning the site of the antenna structure for WSUM-FM. However, the Town of Montrose appealed the Zoning Board's decision to the Dane County Board of Adjustments ("Board") arguing that zoning of this tower structure should never have been considered by the Zoning Board in the first place because construction of the tower by UWS did not qualify as a governmental use. Surprisingly, and much to the dismay of UWS, the Board agreed with the Town of Montrose at the hearing held on July 23, 1998 and denied zoning approval for the tower.

UWS asked the State of Wisconsin's Attorney General to file an appeal in local state Circuit Court on behalf of UWS asserting that construction of the WSUM-FM tower by UWS qualifies as a governmental use. The Attorney General has filed such an appeal. While the pendency of the court case will "toll" the construction permit under the new rules, UWS will now have only the remaining portion of its three-year construction period -- until October 21, 1999 except as "tolled" by the court appeal -- to complete Station WSUM(FM). Thus, under the new CP rules, the Commission counts as "unencumbered" the period of time that the

obtain local land use approval for the site are not regarded by the FCC as constituting grounds for tolling or extending the construction period. Only the actual pendency of the court appeal tolls the period.

zoning process precluded construction of the WSUM(FM) facility.^{2/} UWS is concerned that the new CP rules will not provide sufficient time to construct Station WSUM after the court appeal is resolved, particularly if modifications to the permit are required, given the time lapse.

UWS believes the FCC should reconsider its action -- the FCC's statement that "the three-year construction period provides ample time to complete [the local zoning process] and construct a station or choose a new site free from zoning difficulties" is simply not true based on UWS's experience. In fact, it does not appear that the FCC had appropriate empirical data for its conclusion -- Paragraph 82 of the *Report and Order* indicated that six of seven commenters opposed the FCC's tentative conclusion that problems obtaining local zoning authorization should not be a basis to extend a permit. Moreover, over a year ago, the FCC sought comment on issues relating to zoning delays in conjunction with broadcast station tower siting in MM Docket No. 97-182 and specifically sought information about zoning and land use approval processes.^{3/} The Commission stated: "to the extent that state and local

^{2/} UWS notes that the FCC would also count as "unencumbered" any period of time that an FCC modification application is pending at the FCC. Because such applications may take several months for the FCC to process, and because permittees may not commence construction unless authorized by a CP, UWS believes the FCC should reconsider its tolling rules so that delays in FCC processing do not count as an "unencumbered" portion of a three-year construction period.

^{3/} The Commission stated "We seek a detailed record of the nature and scope of broadcast tower siting issues, including delays and related matters encountered by broadcasters, tower owners and local government officials. Although Petitioners provide anecdotal evidence regarding difficulties encountered by several broadcasters in attempting to meet local ordinances in connection with tower siting and construction, we have no basis on which to determine the extent to which such difficulties are representative of radio and television broadcast industry tower siting experiences generally. So that we might have a factual basis upon which to determine the nature and extent of the problem, we ask commenters to provide us with information on their experiences, both positive and negative,

ordinances result in delays that make it impossible for broadcasters to meet our construction schedule and provide DTV service to the public, important Congressional and FCC objectives regarding prompt availability of this service to the public and prompt recovery of spectrum would be frustrated." *Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities*, MM Docket No. 97-182 (released August 19, 1997). It is inconsistent for the FCC to explain that it is concerned about delays for tower construction in one context, yet impose stringent construction deadlines that ignore these delays and do not allow for extensions because of them in another context. UWS is concerned that neither reality, nor the record in this proceeding, supports the FCC's conclusions about three-year construction periods.

BUDGET/GRANT CYCLES AND WINTER WEATHER

The FCC's new rules make no provision for the special funding situations of noncommercial educational stations that are dependent on state or university budgetary processes or that rely on federal funding from PTFP. State and university budget cycles and PTFP grant cycles do not necessarily coincide with FCC construction periods, therefore, UWS can envision some circumstances where extension of permits might be necessary based on funding grounds for noncommercial stations. The current rules would not allow such

with state and local zoning and land use approvals, and with the application of other laws and ordinances in connection with their efforts to site, construct and operate radio and television transmission towers. Particularly relevant would be comments on the duration of local permitting processes tied to such laws and ordinances.

Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, MM Docket No. 97-182 (released August 19, 1997).

extensions, even if they would serve the public interest.

Moreover, UWS must routinely deal with construction delays caused by the onset of severe winter weather, including the bitter temperatures and high winds typical of a Wisconsin winter, which precludes tower work during many months of the year. These circumstances are clearly beyond UWS's control.

For these reasons, as well as the WSUM(FM) situation described above, reconsideration of the new Rules is required because they violate the statutory standards for construction permits imposed by Section 319(b) of the Communications Act, which requires CPs be extended where construction has been "prevented by causes not under the control of the grantee." By artificially and arbitrarily limiting the definition of "causes not under the control of the grantee" to two specific circumstances (Acts of God and zoning litigation), the FCC ignores the plain dictates of its governing statute which requires extension for any matter outside the permittee's control. Surely, as here, where no construction can take place until local land use processes have been satisfied, and the permittee does all it can to satisfy such processes, any resulting delay is beyond the permittee's control regardless of whether the zoning process results in litigation. And just as surely, where severe winter weather precludes tower work and the installation of antennas and transmission lines, that weather is just as much outside the permittee's control as an "Act of God." Finally, state/university budget and federal grant funding cycles are beyond the control of permittee and may require additional time for noncommercial educational broadcast stations to construct or modify facilities. The new Rules may have seemed tidy to the FCC in limiting the circumstances in which matters might justify tolling a construction period, but they surely do not state the entirety of

circumstances outside a permittee's control, and they therefore violate the standards of the statute.

For the same reasons, the new Rules violate the FCC's obligation to regulate in the public interest, convenience and necessity. The public interest is not served by a draconian CP extension rule^{4/} -- the FCC should not attempt to "streamline" its processes (and reduce staff resources devoted to CP extension requests) at the expense of the public interest.^{5/}

Finally, as a matter of good public policy, UWS believes that reconsideration is required because, just as the new Rules do not appropriately recognize the circumstances justifying extended construction authority for Station WSUM(FM), they also fail to provide appropriate flexibility for other permittees in their own unique circumstances. It is particularly appropriate to provide some mechanism by which noncommercial educational television and radio licensees can show the FCC that they have been diligent in proceeding with their construction obligations, but have been delayed for reasons beyond their control.

^{4/} Such Rules will only invite waiver requests and reconsideration pleadings based on individual circumstances.

^{5/} UWS believes that the number of CP extension requests cited by FCC as required substantial staff resources constitutes valid empirical evidence that there are a variety of circumstances that may justify additional time to construct a broadcast station.

Conclusion

The FCC should reconsider the *Report and Order* by modifying the new Rules applicable to construction permits so that they satisfy the FCC's obligations under its governing statute, and fairly permit permittees extensions where they have been unable to construct for reasons beyond their control. The FCC should particularly consider and accommodate the special needs and circumstances of noncommercial educational television and radio stations in this process.

Respectfully submitted,

BOARD OF REGENTS OF THE UNIVERSITY
OF WISCONSIN SYSTEM

By: Margaret L. Miller

Todd D. Gray
Margaret L. Miller
Its Attorneys

DOW, LOHNES & ALBERTSON, pllc
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036-6802
(202) 857-2571

January 19, 1999

WSUM-FM Timeline

October 1996	FCC awards construction permit (expires April 21, 1998)
November-December 1996	Environmental site assessment tests conducted which show no previous contamination or environmental hazards on the tower site; Soil boring tests indicate that terrain will support a tower; Detailed site plan prepared
January 1997	Montrose Township Land Use Committee unanimously endorses tower construction as consistent with town land use plan
February 1997	Citizens in Montrose raise concerns about the environmental degradation and aesthetic values of a tower in a rural location WSUM withdraws its application to allow it time to commission an Environmental Impact Assessment Study to address these concerns
July 1997	Town of Montrose rescinds earlier approval and passes a new restrictive tower ordinance
November 1997	Environmental Impact Assessment (EIA) Type II study indicate minimal impact of tower on the environment
December 1997	EIA public comment period closes with 18 comments which are addressed by WSUM
January 1998	WSUM files an application with the Dane County Zoning and Natural Resources (ZNR) Board for a Conditional Use Permit for Governmental Use, which the Town of Montrose Land Use Committee opposes. Town raises concern about the effect of towers on rural property values
February 1998	Dane County ZNR postpones action awaiting further reports on property values. Report is expected to be completed by mid-April.

WSUM-FM Timeline

April, 1998	WSUM obtains zoning approval from Dane County ZNR
[]	Town of Montrose appeals Dane County ZNR approval to Dane County Board of Adjustments.
June 23, 1998	Dane County Board of Adjustments denies zoning approval for WSUM tower.
[]	State of Wisconsin AG's Office appeals zoning decision to Wisconsin Circuit Court.
Present	Court Appeal Pending